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No. 83-196

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**In the Supreme Court of the United States**

**October Term, 1983**

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**WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,**

*Appellant,*

**vs.**

**MONSANTO COMPANY,**

*Appellee.*

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**ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MISSOURI**

**~~IN~~ SUPPORT OF AFFIRMANCE  
BRIEF OF AVCO CORPORATION  
AS AMICUS CURIAE**

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**BRIEF OF AVCO CORPORATION  
AS AMICUS CURIAE**

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**INTEREST OF AMICUS CURIAE  
AVCO CORPORATION, LYCOMING DIVISION**

Avco Corporation, Lycoming Division, based in Williamsport, Pennsylvania, is a manufacturer of airplane piston engines. As such, it conceives, researches, designs, develops, tests and manufactures both airplane engines and replacement parts for such engines. It is subject to regulations of the Federal Aviation Administration (FAA) in respect to obtaining a "type certification" for each model engine it intends to market. This because under regulations adopted by the FAA pursuant to authorization of the Federal Aviation Act, Title 49, U.S.C. §§ 1421, *et seq.*, before any aircraft engine or replacement part is introduced into air commerce, it must first be approved by the FAA. Research, development, design and testing of such engines

is at a cost of from six to ten million dollars for each such engine model. Avco considers such designs as valuable trade secrets and takes appropriate steps to retain the confidentiality of such designs.

In about 1972, the FAA adopted certain regulations allowing third persons to manufacture replacement parts for aircraft engines if the FAA granted such third persons a Parts Manufacturer's Approval (PMA). This was pursuant to what is now FAR § 21.303 (Subpart K, Part 21) 14 CFR 85 (1983). Such PMA's could be given the third persons on a number of grounds, including "identity" whereby the third persons would submit to the FAA drawings of the part for which the PMA was sought and, if a proper showing was made by the applicants as to the "identity" of the design so submitted with the drawing which the FAA had obtained from the type-certificate holder, the PMA would issue. In effect, the PMA applicant receives a "free ride", with the original engine manufacturer bearing all costs of research, development, testing, certification and market development.

In practice, this has evolved into a process where the FAA requires the original engine manufacturer, such as Lycoming, to either keep its drawings on file with the FAA and/or available to the FAA for such comparison purposes. In addition, contrary to its own rules, the FAA no longer requires the "showing" to be made by such third persons. Rather, it informally - and unauthorizedly - reveals to third persons what appears on the type-certificate holder's drawing. The FAA has recognized its practice is probably illegal, and in recent testimony before a House of Representatives subcommittee, it stated it anticipates litigation challenging its aforesaid practices. See Hearings Before the Subcommittee On Export Opportunities and Special Small Business Problems of the Committee On

Small Business, House of Representatives, 97th Congress, Second Session, at pp. 286, 289, 296-7.

The Avco drawings and designs required to be submitted to the FAA are trade secrets that fulfil all requirements set forth by § 757, Restatement of Torts, and by the many cases in numerous jurisdictions recognizing both the existence and value of such trade secrets and the protection to be afforded to them.

Avco-Lycoming has registered objection to the FAA in respect to its practice of demanding parts drawings for the purpose of comparing third persons' drawings submitted for PMA approval; to the FAA's failure to require a "showing" by the prospective PMA applicant; and to the FAA's informal but absolutely prohibited and unauthorized practice of revealing in one way or another to PMA applicants details of the manufacturer's designs and drawings. Avco-Lycoming has protested to the FAA, *inter alia*, that its practices effect an unconstitutional taking of property without just compensation.

The present case before the Court has as its chief issue the question of whether or not a governmental agency can use and/or disclose trade secrets required to be submitted to it. Avco-Lycoming does not challenge the right of the federal government to require submission to it of this information so that the government may type-certify engines to be introduced into air commerce. What we are concerned with is the government's illegal, unconstitutional use and disclosure of trade secrets to and for the benefit of third persons. It is on that basis and upon that constitutional question that this *amicus* brief is submitted.

Both the Solicitor General and counsel for respondent Monsanto Company have in writing consented to submission of this *amicus* brief by Avco-Lycoming.

### STATEMENT OF THE ISSUE

Although several issues are raised in this appeal, Avco Corporation, as *amicus curiae*, addresses only one main issue:

Was the district court correct in ruling an unconstitutional taking is effected by a government agency's use and/or disclosure of trade secrets it requires be submitted to it?

We respectfully submit this should be answered YES.

## SUMMARY OF ARGUMENT

All citizens hold property subject to certain limitations which may be imposed thereon for the public good. The question is at what point such limitations so intrude upon property rights as to become a taking, or to violate due process. Put another way, at what point must the public at large, rather than the property owner, pay for the desired limitation.

Where there is a conflict between an exercise of the Commerce clause and rights under the Takings clause, the Takings clause prevails. To ascertain if there is a conflict, general propositions are not relied on. Rather, the Courts examine the "particular facts" of the matter and the "degree" of the Congress' intrusion on property rights in its attempt to exercise Commerce clause powers.

Here, to uphold (a) the use or consideration provisions and (b) the disclosure provisions, two different rationales for the Congress' action are given, a separate one for each. In respect to (a), the use or consideration provisions, it is said the Congress was attempting to promote competition and eliminate duplication (purposes which are themselves internally inconsistent in economic theory). However, a closer, more realistic examination shows that no matter what rationale is offered, there is a naked, unabashed taking from the submitting manufacturer. The taking is accomplished by the mandated sharing and imparting of valuable trade secrets with competitors. Promotion of competition and elimination of duplication cannot be constitutionally accomplished by simply stripping a citizen of his property and handing it over to his competitors. Nothing could be better proof of this unconstitutional taking than the statutory scheme itself in which the Congress

(1) recognizing compensation had to be made, provides for a procedure whereby payment is made to the submitting manufacturer, and (2) provides for such compensation to be paid by private, not government, funds - a sure indication the taking was for private purposes and not for a public use, as required by the Fifth Amendment.

In respect to (b), the disclosure provisions, the rationale used to justify it is based fundamentally on a distrust of the EPA's capabilities and competency. It is claimed dissemination to unidentified members of the public is necessary to enable the public to oversee or monitor the EPA in its work. However, if an agency created and funded by the Congress is unable to perform its functions without public oversight, the appropriate and reasonable means to correct these deficiencies is to take steps to cure the agency's inabilities. It is not to scatter the submitting manufacturer's trade secrets to the four winds in the hope that persons finding them may then be able to aid the agency in its work. Such method throws the entire cost of the agency's incompetence or disabilities on the submitting manufacturer. Further, such delegation of power is not to a well-defined group or body. Rather, it is to unnamed, unidentified members of the public. Nor does the statute offer any standard by which the public's feelings will either influence or bind the agency.

Complaint is here made of an "unconstitutional taking." Both words are to be emphasized. It is clearly a "taking" if only because the Congress itself provided for compensation to be made. It is "unconstitutional" if only because the Congress has itself provided private parties must pay such compensation, proof it is not for a public use. Both provisions are in the statute itself. Even if not unconstitutional, it is still a taking.

## ARGUMENT

### **The District Court Properly Ruled An Unconstitutional Taking Is Effected By A Government Agency's Use And/Or Disclosure Of Trade Secrets Required To Be Given It.**

Surely the arguments appellant makes to uphold this legislation are among the strangest ever presented to this Court.

To uphold the use (or consideration) provisions, appellant makes an utterly inconsistent economic argument, i.e., the Congress was supposedly seeking to promote competition while eliminating duplication, an internal contradiction in economic concepts. As to the disclosure provisions, according to appellant, the legislative scheme which appellant seeks to have this Court uphold presents a unique picture in which the Congress believes the regulatory agency it created to be inept and incompetent. It therefore finds it necessary to require the regulated industry to yield up its trade secrets to unidentified members of the public and scientific community so they can monitor such agency's activities.

Other arguments are equally strange: Appellant contends this is not a taking; yet the Congress makes specific provision to pay compensation to the submitting manufacturer for the property taken. Appellant argues this is not for private purposes but is for a public use; yet the Congress provides for private parties - not the government - to make payment to the submitting manufacturer.

We certainly acknowledge that the Congress in regulating commerce has a wide discretion to choose appropriate and reasonable means to accomplish its ends. However

in this case, the means chosen are specifically based on the supposed ineptitude and incompetency of its own regulatory agency and do not here seem to be appropriate and reasonable. They certainly cannot justify a taking without just compensation. Yet such agency deficiencies are in reality the very bases on which appellant argues to uphold the disclosure provisions.

These unique arguments are made because this case presents a head-on confrontation between the Commerce clause (Art. I, § 8, Clause 3) and the Takings clause (Amendment V). On the one hand is the Congress' undoubted power and authority to impose restrictions and limits upon this industry's introduction of certain chemicals into interstate commerce. No one seriously doubts the Congress' power and authority to do so. On the other hand are the protections afforded each citizen by the Fifth Amendment's Takings clause, requiring that any taking be for a public use and only then when any person so affected is given just compensation.

While some of this Court's more recent cases have dealt with this clash between these two clauses, perhaps none has presented the picture so well or in so clear-cut a manner (and in such precise, lucid language) as *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). The majority opinion was written by Justice Holmes; the dissent by Justice Brandeis. Each argued clearly and articulately the respective positions.

It is true that in *Pennsylvania Coal*, it was the state's police power, rather than the Congress' power under the Commerce clause, that was at issue. But given the expansive interpretations afforded the Commerce clause since 1922, the respective scopes of both police power and Commerce clause can for present purposes be deemed coexten-

sive. In *Pennsylvania Coal*, the state had imposed severe regulations on the ability of coal companies to mine underground in certain areas. The mine owners argued a taking had been effected, a position with which this Court agreed.

After expounding government's need to be able to regulate and the requirement that all citizens' rights of ownership be limited and subject to some degree to the sovereign's ability to regulate for the common good, Justice Holmes stated, 260 U.S., at p. 413:

But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. Where it reaches a certain magnitude, in most cases if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts. The greatest weight is to be given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. \* \* \*

(at p. 415) The general rule, at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. \* \* \*

(at p. 416) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions.

In large part, Justice Brandeis' dissent did not take issue with Justice Holmes' approach of examining the "par-

ticular facts" and the "question of degree", of not attempting to dispose of the issue with "general propositions". His point of departure was of course his view of those particular facts and the degree of intrusion under the circumstances there presented. See also *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979).

Where there is conflict between the Commerce clause and the Takings clause, i.e., there has been in the exercise of Commerce clause powers a taking of property, the Takings clause prevails. The Commerce "power like others, must be exercised in subordination to the 5th Amendment. *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 336; *U.S. v. Lynah*, 188 U.S. 445, 465, 471." *U.S. v. Cress*, 243 U.S. 316, 326 (1916).

. . . . .

With this introduction, we may proceed to examine the "particular facts" of the Congress' legislative regulation here, the "question of degree" to which it intrudes on private ownership.

From a broad overview, the Congressional legislation authorizes a federal agency to require that anyone wishing to introduce certain new products on the interstate market must first register them. This is done by requiring a prior submission to the agency of certain information, research and test data about the new product. The agency must then approve the new product. Little or no objection is raised as to the government's authority to require such submission and approval.

The manufacturer's information, research and test data for such new products are obtained, gathered and compiled at significant cost and often after years of research. They legitimately qualify as trade secrets. If the information and data so warrant, agency approval is ob-

tained, the new product is registered and the submitting manufacturer can then market the product.

In the agency's hands, however, the legislation authorizes, first, the submitting manufacturer's information, research and test data to be used to support the subsequent applications of other persons without the permission of the original, submitting manufacturer. In addition, the agency is also authorized (and even directed) to make such "health and safety" data available to members of the public as well as to other federal agencies.

Thus, EPA's use (or consideration) and/or disclosure of appellee's trade secrets takes two forms: (1) Its use (or consideration) under § 3(c) (1) (D), 7 U.S.C. § 136a (c) (1) (D); and (2) its disclosure under § 10(b) and (d), 7 U.S.C. § 136h(b) and (d), and last sentence § 3(c) (2) (A), 7 U.S.C. § 136a(c) (2) (A) (1982).

Interestingly, appellant employs two different rationales - a separate one for each of these two aspects - to justify this exercise of Congressional power: For the use (or consideration) aspect under § 3(c) (1) (D), it claims the Congress was attempting to promote competition and at the same time eliminate "needless duplicative testing" of pesticides already registered, see p. 12, Appellant's Brief. For the disclosure aspect under § 10(b) and (d) and § 3(c) (2) (A), it claims the "health and safety data" are necessary so that the public and the scientific community can monitor the EPA's activities and in effect participate in or oversee the EPA's decisions, see pp. 13-14, Appellant's Brief.

We may briefly examine each of these claimed rationales:

*Use (or consideration) authority under § 3(c) (1) (D).*  
No one doubts the authority and power of the Congress to

promote competition. To this end, the Congress has of course been repeatedly upheld in respect to the constitutionality of its legislation removing restraints of trade. This is unquestionably a proper function of the Congress in regulating commerce.

However, it is one thing to remove or regulate against restraints of trade so as to promote competition. It is quite another to decree that a company or an individual, having developed at substantial expense to itself a piece of valuable property giving it a competitive edge, must disgorge that property, yield it up to a government agency if it is to be marketed, and allow the government agency to distribute it to other persons, all in the name of supposedly promoting competition and eliminating duplication of effort.\*

While the Congress certainly can promote competition by setting ground rules in the conduct of business and legal relations, it cannot take property away from a citizen, distribute it to that citizen's competitors in the name of promoting competition, and not expect to pay for the privilege of doing so. No amount of theoretical, after-the-fact rationalization can justify legislation which "mandate[s] the forced sharing of property and markets created by one person for the benefit of private parties", *Monsanto Company v. Acting Administrator*, 564 F. Supp. 552, 566 (E.D. Mo. 1983). The district court properly overruled this strictly theoretical argument in view of the actual reality of an unabashed taking for private purposes.

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\*As noted at the outset, a question of economic theory is raised: Are not the supposed dual goals of promoting competition and eliminating duplication inconsistent with each other? Competition presupposes duplication by similar producers. It must be conceded, however, this inconsistency is here solved by simply depriving the producer of its product and distributing it to its competitors who thereby get a "free ride".

If anything would indicate that the Congress itself knew and understood it could not thus deprive a citizen of his property constitutionally, it is that provision which the Congress itself included providing for payment by the "me-too" applicant to the submitting manufacturer, albeit through the disputed method of binding arbitration, § 3(c) (1) (D) (ii), Title 7, U.S.C. § 136a(c) (1) (D) (ii). The mere fact that the Congress provided for payment to the submitting manufacturer - even if the method is here disputed - is almost positive proof that the Congress itself understood it was providing for a taking and just compensation had to be made in some manner to avoid the taint of unconstitutionality. And the further fact that the Congress provided for private parties to make the compensation is equally positive proof that the taking is for private, *not* public, purposes. See discussion below.

On the question of whether this is a private use or a public use, the statutory scheme of payment by private parties is certainly a clear indication the Congress knew it was for private use. If it is for a private use, it is clearly unconstitutional and cannot be upheld under any means. If it is for a public use, one of the preconditions for a taking under the exercise of eminent domain has been fulfilled and just compensation is required. As previously stated, the Congress clearly recognized this by its binding arbitration provision affording payment to the submitting manufacturer. While our own particular view is agreement with the district court that it is indeed a private use (indicating the taking is clearly unconstitutional), this is not strictly necessary to our position that it is nevertheless a taking. Even if it be found it is public use, just compensation must be made.

In this respect the trial court, after several weeks of trial and the introduction of voluminous evidence, con-

cluded in respect to the claimed justification that the Congress was supposedly attempting to promote competition, 564 F. Supp., at p. 566:

The Court also finds that § 3(c)(1)(D) unabashedly operates to further a private purpose. Internal use of Monsanto's data can only enrich its competitors. The public stands little to gain from § 3(c)(1)(D). This is not a situation where competition is sparse or non-existent, to the contrary, the trial record amply demonstrates the competition and the pesticide industry as healthy and vibrant.

The Court is aware of the deference which must be shown Congressional pronouncements of what constitutes a public purpose. *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102, 99 L. Ed. 24 (1954). Nevertheless, the Court would be abdicating its responsibility to follow the Constitution if it did not rationally analyze laws which, in the name of public policy, mandate the forced sharing of property and markets created by one person for the benefit of private parties. *Thompson*, 300 U.S. at 78-79, 57 S. Ct. at 375; *U.S. v. Carolene Products*, 304 U.S. 144, 147, 58 S. Ct. 778, 780-81, 82 L. Ed. 1234 (1938).

The facts fully support the district court's findings and conclusions in this respect. How much competition is necessary? There was ample competition, with many companies submitting data and seeking registration for new products. See, e.g., Finding of Fact No. 37, 564 F. Supp., at p. 560. But even if there were little or no competition, the Congress could not deprive a citizen of property and distribute it to others ("mandate the forced sharing of property", 564 F. Supp., at p. 566), such as is done here, without making just compensation. Certainly the Congress itself recognized this.

Additional indication that the taking is for private purposes is the unquestioned fact that it is the private parties themselves, *not* the government, who are required by the statute to make payment for such "free ride". What further proof is necessary to show this is not only a taking, but one for private purposes? The statute itself thus shows the unconstitutional nature of this scheme.

*Disclosure authority under § 10(b) and (d) and § 3(c) (2) (A).* In respect to the disclosure provisions of the "health and safety data" under § 10(b) and (d) and § 3(c) (2) (A), a different rationale is advanced. Here it is stated the public has a right to know this information so as to facilitate its participation in EPA decisions as to whether or not a product is to be registered and allowed to be marketed. In other words, as is set forth above, the Congress having created a federal agency, supposedly believes such agency to be so inept, so inefficient and so incompetent that it will allow unnamed and unidentified members of the public access to confidential information belonging to others so that such members of the public can somehow oversee the EPA's activities. This reasoning was expressed by Senator Kennedy in his remarks of July 29, 1977, 123 Congressional Record 25711:

Of particular significance in the bill as reported is the provision for public disclosure of the safety testing data on pesticides submitted to the EPA by industry. While providing for sufficient protection of "trade secret" information relating to individual pesticide products, this provision will allow for public scrutiny of the EPA's regulatory effort. And I submit that the EPA needs all the help it can get in performing this very difficult regulatory task.

As the trial court noted, there is complete labelling provided for on these products, 564 F.2d, at pp. 556, 563,

567. But this is not a mere labelling provision where manufacturers can properly be required to place certain information upon labels. Here the manufacturer makes no claim the labelling requirements are improper. Rather, the manufacturer is here required to submit to the EPA so that it can make available to unidentified members of the public extensive data developed at substantial cost. The acknowledged purpose is that public input is necessary to assist the agency in performing its tasks. Surely this is one of the first times the Congress has provided for such backup of one of its own agencies.

We leave aside for the moment the question of delegation of power to such unnamed, unidentified citizens - itself a serious constitutional issue. Rather, we focus only on whether or not this proposed broadcast of trade secrets, developed at substantial cost (and recognized as trade secrets) by the submitting manufacturer, may be thus accomplished solely so that members of the public can oversee and monitor the agency's activities. It should be noted the district court made reference to the fact that the EPA was competent to handle its assigned tasks and had available to it substantial funds and facilities, without need of disseminating the trade secrets, 564 F. Supp., at p. 567.

It would seem most inappropriate that the very foundation of a Congressional enactment should be the supposed ineptitude and incompetency of its own agency. One would suppose that a government agency, once created and funded by the Congress, will be efficient, competent and able to make its own correct decisions. As stated, the trial court found the EPA could do its assigned job. To presuppose that the agency is unable to do so and requires the dissemination of trade secrets to unidentified members of the public to help it in its work misplaces the emphasis on

what should be done. We do not say the Congress cannot legislate in respect to its own agencies and recognize their shortcomings in this manner. We only say this justification for allowing dissemination of valuable trade secrets is wholly misplaced when done at the cost of the submitting manufacturers.

As long ago as *McCulloch v. Maryland*, 17 U.S. 316 (1819), this Court ruled the Congress is entitled to adopt any reasonable and appropriate means (within constitutional limits) to accomplish the purposes of the particular exercise of its powers under the Commerce clause. See also *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 258-9 (1964). However, if an agency it has created is so inept and so incompetent that it cannot be trusted to act for itself and oversight of its activities must be delegated to unnamed and unidentified members of the public, the reasonable and appropriate means for addressing the problem is to correct that agency's deficiencies. It is not to require submission and then dissemination of a regulated industry member's trade secrets. Such is not reasonably necessary and appropriate to the goal of the agency properly regulating introduction of new chemicals on to the market. Most importantly, even if it be deemed reasonably necessary and appropriate, it is a taking for which just compensation must be made.

Further to be doubted is the indiscriminate delegation of powers to such unnamed and unidentified members of the public so that they may oversee the agency's work. (The record herein indicates such members of the public include appellant's competitors.) While this Court has frequently upheld delegation of powers to non-governmental entities, it has usually been done in respect to a limited, well-defined group of persons; it has rarely, if ever, been done, as here, to the public at large. See

*Shechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935). As the district court pointed out, Finding No. 63, 564 F. Supp., at p. 563, there is available to the EPA a Scientific Advisory Panel. It is appropriate and reasonable to use such Panel's services. It is not appropriate and reasonable to employ an indiscriminate scattering of trade secrets to the four winds. It is appropriate and reasonable to use the resources available to the EPA. It is not appropriate and reasonable to seek unnamed and unidentified members of the public who will supposedly influence the agency in some undefined manner. See 564 F. Supp., at p. 566.

Not only are the members of the public to whom this data will be given left unnamed and unidentified (rather than defining the bodies or groups to which such delegations of powers have been made, as previously upheld by this Court), but the standards by which their actions or votes will be allowed to influence or affect the EPA are left similarly vague. In those instances where this Court has previously upheld delegation of powers to members of the public, the statutes have specifically identified those members of the public to whom the delegation of powers is made, e.g., *Curran v. Wallace*, 306 U.S. 1 (1939) (tobacco growers); *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381 (1940) (coal producers). In addition, the standard under which the public's actions were to influence regulations issued in the name of the government was also set, e.g., two-thirds of those voting. Here, there is no such identity of a well-defined group, nor are there standards by which the undefined members of the public will be able to influence EPA decisions or become binding upon the agency.

When an agency is so inept and so incompetent as to be unable to do its job - the basis of the justification given by appellant for the disclosure authority - the reasonable

and appropriate means is to correct that agency's deficiencies. It is not to take trade secrets from members of the regulated industry so as to enable dissemination to unidentified members of the public so that they may do the agency's job for it in some undefined manner.

Cited in support of the justification for the disclosure provisions of § 10(b) and (d) are excerpts of legislative history mentioning the "public's right to know". No decision of this Court has articulated such a "right". In *Gannett Company v. DePasquale*, 443 U.S. 368 (1979), this Court ruled that insofar as the criminal law was concerned, there is no such thing as a "public right to know", 443 U.S., at pp. 379-380, the right to a public trial being personal to the defendant only. We know of nothing which transfers any such non-existent right into the civil area or can serve as a basis for justifying an otherwise invalid Congressional exercise of Commerce clause powers. Certainly the Congress can, if it chooses, make information properly belonging to the government available to the public in its exercise of the Commerce power, thereby in effect giving the public a "right" to such information. But where such disclosure is at the cost of depriving a citizen of property, any such "public right to know" cannot be made a pretext to avoid making just compensation for a taking.

The argument is also made by appellant, see pp. 29-30, Appellant's Brief, that by submitting such information in order to obtain the authority to market the chemicals in question, the submitting manufacturer has somehow waived its right to object to the dissemination of its trade secrets, even if such dissemination is unconstitutional. This type of argument has long been discredited, see e.g., *Standard Airlines, Inc. v. C.A.B.*, 177 F.2d 18, 20 (D.C. Cir. 1949). *Frost v. Railroad Commission*, 271 U.S. 583, 593

(1926); *U.S. v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 282 U.S. 311, 328 (1931); *Balelo v. Klutznick*, 519 F. Supp. 573 (S.D. Calif. 1981) at p. 580. Rather, we respectfully submit the indiscriminate disclosure of trade secrets to unidentified persons under the pretended justification that such is necessary to oversee and correct the actions of a supposedly incompetent agency are wholly inappropriate and insufficient.\*

Thus, returning to the touchstone case, *Pennsylvania Coal Company v. Mahon*, examination of the "particular facts" and the "question of degree" of the legislature's acts show clearly there has been a taking which cannot be justified by a purported exercise of Commerce clause powers. As both Justice Holmes and Justice Brandeis indicate, this is the decisive issue. While the judgment of the legislature is to be given the greatest weight, it is not conclusive. If it were, as Justice Holmes noted, the contract and due process (and, he might have added the taking) clauses would all be nullified in the name of the Commerce clause.

Rather, neither of these justifications for this exercise of Commerce clause powers can in this instance be used to

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\*Appellant's additional arguments that these are not trade secrets are plainly contrary to the legislative history. For example, discussion in the Subcommittee on [Agriculture] Department Investigation, Oversight and Research clearly shows specific recognition of all this data as trade secrets, see U.S. Code Congressional and Administrative News, 95th Congress, Second Session 1978, at pp. 2014-2015. See also House Conference Report, *ibid.*, at pp. 2054-2056; Senate Report 95-334, at p. 31 (registrants' "proprietary interest" recognized). Equally invalid is appellant's argument that the use and/or disclosure is not a taking. The very essence of a trade secret is its confidentiality; dissemination destroys this primary characteristic thus depriving it of practically all value. *St. Michael's Convalescent Hospital v. State of California*, 643 F.2d 1369, 1374 (9th Cir. 1981); *Wearily v. FTC*, 462 F. Supp. 589 (D.N.J. 1978), vacated on other grounds 616 F.2d 662. Valuable rights have here been taken. *Loretto v. Teleprompter Manhattan CATV Corp.*, 73 L.Ed.2d 868 (1982).

support deprivation of a citizen's property rights without payment of just compensation. The claimed economic goal of promoting competition and eliminating duplication are insufficient in this instance when (a) they are achieved by the forced sharing of appellee's property, and (b) they place the entire burden of such goals on appellee, to the obvious benefits accruing to the "me-too" registrants. Indeed, so obvious are those benefits that the Congress requires such "me-too" registrants to pay for them!! "If the government's encroachments on private property make it possible for another to get the benefits of that property, the United States is liable just as if it used the property for itself." *Eyherabide v. U.S.*, 345 F.2d 565, 570 (Ct. Cl. 1965). It is the loss to the owner, not the accretion to the government, for which just compensation is to be made. See also *Aris Gloves, Inc. v. U.S.*, 420 F.2d 1386 (Ct. Cl. 1970). Here, the statute requires the "me-too" registrants to make the payments, almost conclusive proof that it is a taking for private use - a clearly unconstitutional act.

The disclosure provisions are equally bizarre. The basis of their justification is a distrust of the federal agency's abilities. While the Congress certainly has the right to adopt appropriate and reasonable means necessary to accomplish its goals, it cannot place the entire burden and cost of compensating for the agency's deficiencies upon the submitting manufacturer. Ordinarily, when a federal agency has deficiencies, the Congress will take steps to correct them. Here, the steps taken are not addressed to meeting that problem. While this Court will properly refrain from trying to impose its own ideas of appropriate and reasonable means, it must still speak up when those means the Congress has chosen result in a taking beyond its constitutional powers. Surely there are appropriate

and reasonable means to curing an agency's deficiencies apart from taking the materials submitted to such agency, strewing them to the four winds and hoping that the person finding them will help the agency out.

Argument is here made of an "unconstitutional taking." Both words of this phrase should be focussed upon. We need look no further than the statute itself. It is clearly a "taking" if only because the statute itself provides for compensation to be made to the submitting manufacturer whose trade secrets are being used and/or disclosed.\* It is clearly "unconstitutional" if only because the statute itself provides that the compensation to be paid the submitting manufacturer is to be made by private parties, a conclusive indication it is for a private purpose, not the public use required by the Fifth Amendment. It would be difficult to conceive of a more patent "unconstitutional taking." But even if not unconstitutional, it is still a taking for which just compensation must be made.

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\*The Congress clearly recognized appellee's property rights in the health and safety data, Senate Report 95-334, at p. 31. ("The amendments in S. 1678 recognize the proprietary interest in health and safety data on the part of pesticide registrants who underwrite the expense of obtaining such data.") In view of this it is somewhat difficult to understand appellant's extensive argument against recognizing this data as property which is taken.

**CONCLUSION**

For the reasons and authorities cited above, the judgment of the district court should be affirmed.

Respectfully submitted,

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